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IN THE

SUPREME COURT OF THE UNITED STATES

70-276

OCTOBER TERM, 1970

No. 1821

D. J. McQUESTION AND SONS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, D. J. McQuestion and Sons, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered March 19, 1971, wherein petitioner was plaintiff and the United States was defendant, said judgment being rendered in Case No. 335-67 in the United States Court of Claims.

OPINION BELOW

The opinion of the United States Court of Claims is printed in an appendix filed with this petition. There is also printed in said appendix a copy of the opinion of the Corps of Engineers Board of Contract appeals, dated March 27, 1967 (Eng. BCA 2714), which latter opinion constituted a final determination of petitioner's claim administratively.

DATE OF JUDGMENT TO BE REVIEWED

The judgment of the United States Court of Claims is dated March 19, 1971, and it was entered on that date.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28 USC 1255 (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of the Court of Claims that plaintiff failed to establish that it encountered a "changed condition" in the performance of its contract, are overridden by subordinate findings that there was no way of determining accurately whether proper materials would be found as specified by the Government if development of Area B "had been seriously undertaken by plaintiff."

2. Whether the finding of the lower court that there was no evidence to establish a change order by defendant is legally sustainable.

STATEMENT OF MATERIAL FACTS

Petitioner was awarded a contract by the United States Army Engineer District of Tulsa, Oklahoma, dated May 15, 1962, under which petitioner was to construct the earthen embankment and to perform the spillway excavation at the

Millwood Dam, Little River, Arkansas. The total contract price was estimated to be $2,058,780.

The material to be used was specified to be essentially inorganic in nature and capable of being compacted. The contract specifications and drawings indicated that an area designated as the western part of "borrow area B" which ran parallel to the axis of the embankment would be the source of the material to be used.

Petitioner commenced work under the contract on or about May 23, 1962 at which time borings were made by petitioner in the locations specified in the specifications, but on examination of the soil submitted by petitioner to the assay office of the Engineers, on the location, the samples were rejected as unsuitable. Thereafter, petitioner conducted approximately 90 borings and submitted soil from these borings for testing at the Engineers' assay office, all of which were found unsuitable for use on the contract. (App. A22-A23)

Petitioner was consequently obliged to haul all of the material, consisting of 2,785,000 cubic yards of impervious and random material to the embankment, at a distance greater than 2000 feet which was specified in the contract, as the maximum hauling distance to be required.

The cost of the extra haulage and the construction of the necessary road required petitioner to expend $187,656.20 over and above its estimated costs and it is for this amount suit was brought.

The pertinent matter before the Court on this writ is whether the subordinate findings of the lower Court to the effect that there was no way to accurately determine whether if the development of the western part of borrow area B had been seriously undertaken by the plaintiff it would or would not have provided an adequate supply of

- - - - materials for the western portion of the embankment, does not override the ultimate finding of the Court that there was no changed condition found by the contractor, and whether there was a lack of substantial evidence to sustain the finding that there was no breach of contract by defendants.

ARGUMENT

1. The ultimate fact found by the lower Court that adequate material existed in Western borrow Area B conflicts with the subsidiary finding that if the contractor had bored more holes he may have found such suitable material and is also based on a lack of substantial evidence.

The statement in the Commissioner's report, adopted by the Court of Claims, that "there is no way of determining accurately from the evidence in the administrative record, whether, if development of the western part of borrow area B had been seriously undertaken by the plaintiff, it would or would not have provided an adequate supply of impervious and select random materials for the western part of the embankment," is completely refuted by testimony of Burl Brown who testified that he dug about 90 holes and that the representatives of the Engineering Corps picked samples from those borings and that there were more failures than good tests. (App. A24)

In view of the extensive search for usable material on western borrow area B, and petitioner's total failure to find suitable material, and in view of the presence of the Government's representatives on the job at all times, who exercised constant supervision of petitioner's work and the testing of samples by the Engineers themselves, the claim made by the Government's witnesses that they knew nothing of the negative results of tests; except for the admission of Mr. Barrett, the Government's Engineer Assist-

ant that he was advised of the difficulty in securing suitable material (See Appendix A26-A27) knew nothing of the drilling of holes for test material; knew nothing of the building of a road to obtain access to usable material, lacks credibility and flies in the face of positive testimony to the contrary.

The finding that proper material was available in the western part of Area B was not based on any substantial evidence, *U. S.* v. *Goltra,* 61 S.Ct. 487, 312 U.S. 203, 85 L.Ed. 776 modifying 91 Ct. Cl. 42.

The actions of defendant's personnel on the job and their tacit approval of plaintiff's actions to fulfill its contract obligations, and their acquiescence in what petitioner did to secure proper material for the job waived all formal requirements for a written change order under provisions of the contract. In such a case, where the change necessarily causes increased expenses *no notice is required, assuming that the change is necessary. Hawkins* v. *U. S.,* 12 Ct. Cl. 181 aff'd in 96 U.S. 689, 24 L.Ed. 607.

Insofar as notice to the Government is concerned, it has been held that oral representations by the Contractor to the Government's personnel, including Government engineers, satisfies the notice requirement. *General Casualty Co.* v. *United States,* 130 Ct. Cl. 520 (1955). And that the requirement of a written notice will not apply in the case of a changed condition. *Appeal of Eisen-Magers Construction Co.,* ASBPA 5174, 59-1 BCA 2234 (1959). Especially is this true where the Government is familiar with the difficulties experienced by the Contractor and Government personnel were working closely with the Contractor. *Shepherd* v. *United States,* 125 Ct. Cl. 724 (1953). It is the notice of changed conditions, not notice of extra compensation that the contract requires. *Shepherd* v. *United States,* supra. And if notice in some way of the

changed condition comes to the appropriate agent of the Government notice by the Contractor is not required. *Hirsch* v. *U. S.*, 24 Ct. Cl. 602.

Courts have repeatedly held that the specifications cannot alter the legal effect of the changed conditions clause, and that the Contractor has the right to rely upon the Government's representatives. *Felhaber Corp.* v. *United States*, 138 Ct. Cl. 571 (1957), cert. denied 355 U.S. 877.

This rule is explained in ASPR 7-602.4, March 1, 1963, in which it is said that the purpose of the "changed conditions" clause in the contract is to eliminate from the contractor's price any contingencies covering the discovery of subsurface or latent physical conditions differing from those described in the contract, and unknown physical conditions of an unusual nature and differing materially from those that would normally be expected at the work site.

This Regulation follows the reasoning in *Great Lakes Dredge and Dock Co.* v. *United States*, 119 Ct. Cl. 504 (1951), where it was said:

> "The equitable adjustment referred to in Article 4 of course means adjustment which is equitable to take care of the increased cost resulting from the unexpected conditions encountered. The question presented to the Contracting Officer, and now to the Court, is what were Plaintiff's increased costs, and therefore, what was the equitable adjustment to which it was entitled."

It is apparent that where the Government agents knew or should have known that petitioner could not get the material called for in the contract, at the location specified, and that the contractor had to go elsewhere to get such material, the Government should be and is bound for any additional costs. This is particularly true in view

of the strenuous effort of petitioner to locate suitable material on the locations designated by the Government in its specifications.

After 90 borings, more or less, which failed to produce affirmative results, petitioner should not be held to have made inadequate tests as indicated by the Court of Claims. To have compelled the contractor to drill an unlimited number of borings would be clearly beyond the intent and purpose of the contract, the main aim of which was the completion of the embankment to the dam.

CONCLUSION

The writ prayed for should be issued because the finding of the lower court that there were no changed conditions over-rides its previous finding that there was no way to determine that matter unless the contractor seriously undertook further development; also because a change order was not required under the facts in the case and in view of the authorities cited; and also because the decision of the Court of Claims was based on a lack of substantial evidence.

Respectfully submitted,

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IN THE UNITED STATES COURT OF CLAIMS

No. 335-67

(Decided March 19, 1971)

D. J. McQUESTION AND SONS v. THE UNITED STATES

Harry H. Meisner, attorney of record, for plaintiff. *Meisner and Meisner*, of counsel.

Lawrence S. Smith, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

PER CURIAM: This case was referred to Trial Commissioner Mastin G. White with directions to prepare and file his opinion on the issues of plaintiff's motion and defendant's cross-motion for summary judgment under the order of reference and Rule 166(c). The commissioner has done so in an opinion and report filed on February 12, 1970, wherein such facts as are necessary to the opinion are set forth. Plaintiff filed a request for review by the court of the commissioner's report; defendant urged that it be upheld and the petition dismissed. The case has been submitted to the court on oral argument of counsel and the briefs of the parties.

Since the court agrees with the opinion and recommended conclusion of the trial commissioner, with very slight modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case as herein-

after set forth. Therefore, plaintiff's motion for summary judgment is denied defendant's cross-motion is allowed, and plaintiff's petition is dismissed.

Opinion of Commissioner

White, *Commissioner*: The plaintiff in this case asks the court to review, under the provisions of the Wunderlich Act (41 U.S.C. §§321, 322 (1964)), a decision by the Corps of Engineers Board of Contract Appeals dated March 27, 1967 (ENG BCA 2714), to the effect that the plaintiff had not established its entitlement to an equitable adjustment under the "changed conditions" provision of Contract No. DA-34-066-CIVENG-62-2441.

It is my opinion that the administrative decision should be upheld.

Contract No. DA-34-066-CIVENG-62-2441 ("the contract") was entered into under the date of May 15, 1962, between the plaintiff and the defendant (represented by a contracting officer of the United States Army Engineer District, Tulsa, Corps of Engineers). Under the contract, the plaintiff was to construct the earthen first-stage embankment and to perform the spillway excavation at the Millwood Dam, Little River, Arkansas. The total contract price was estimated to be $2,058,780.

The earthen first-stage embankment was to be approximately 8,500 feet long and was to consist of approximately 290,000 cubic yards of impervious material at the core of the embankment, of approximately 335,000 cubic yards of select random material, and of approximately 2,160,000 cubic yards of random material.[1] The contract specifications prescribed fairly strict requirements with respect to the material that might be used for the imper-

1. In addition, some filter material was to be used. However, the filter material is not involved in the present litigation.

vious core of the embankment; and the specifications prescribed a somewhat less strict standard with respect to the material that might be used for the select random fill. The material to be used for random fill did not have to meet any particular requirement, except that it had to be essentially inorganic in nature and capable of being compacted in thin lifts. Any material suitable for the impervious core was also suitable for use as select random fill or as random fill; and any material suitable for select random fill was also suitable for use as random fill.

The contract specifications and drawings indicated that borrow area B, which ran parallel to the axis of the embankment, would be the source of the materials to be used for the impervious core of the embankment, for the select random fill, and for the random fill.

Paragraph 4 of the general provisions of the contract stated as follows:

> 4. CHANGED CONDITIONS
>
> The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has

> given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

The contract contained, as paragraph 6 of the general provisions, the standard "disputes" provision that is customarily found in Government construction contracts.

Notice to proceed with the work under the contract was issued to the plaintiff under the date of May 23, 1962. All of the work was completed by February 20, 1964.

By means of a letter dated September 8, 1964 (which was more than 6 months after the completion of the work under the contract), the plaintiff submitted to the contracting officer a claim for additional compensation in the aggregate amount of $305,933.15. The claim consisted of six separate items. Only item 1 is involved in the present litigation. Item 1 was in the amount of $187,656.20 and was asserted under the "changed conditions" provision of the contract.

In a decision dated May 6, 1965, the contracting officer denied the plaintiff's "changed condition" claim, on the ground that the plaintiff had failed to give the contracting officer a timely notice with respect to the encountering of the alleged "changed condition," as required by paragraph 4 of the general provisions of the contract, and that the failure to give a timely notice had materially prejudiced the rights of the defendant.

The plaintiff appealed to the Corps of Engineers Board of Contract Appeals ("the Board") from the contracting officer's decision of May 6, 1965. After holding a hearing in September 1966, the Board rendered a de-

cision on March 27, 1967 (ENG BCA 2714). In its decision, the Board discussed the evidence that had been adduced at the hearing, and then reached the following conclusion:

> We conclude from the evidence presented by the appellant [plaintiff] that it has failed in its burden of establishing that the materials which it encountered differed materially from what is shown on the contract drawings and log borings or that the soil conditions encountered were not what an experienced contractor should have anticipated from a reasonable analysis of the core boring data and specifications. * * *

In view of the adverse decision on the merits of the plaintiff's "changed condition" claim, the Board stated that it was unnecessary to pass on the question of whether the plaintiff had given a timely notice to the contracting officer.

At the hearing before the Board, the plaintiff did not attempt to prove that it had encountered (in the language of the "changed conditions" provision of the contract) "subsurface or latent physical conditions at the site differing materially from those indicated in this contract," or "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." Accordingly, the Board was correct in deciding that the plaintiff had failed to establish its entitlement to an equitable adjustment under the "changed conditions" provision of the contract.

The plaintiff's evidence in support of the claim now under consideration was to the effect that the subsurface information (in the form of logs of core borings and other data) which the defendant furnished to the plaintiff and other prospective bidders, which the plaintiff used in pre-

paring its bid, and which became part of the contract papers, indicated that an adequate supply of impervious material and select random material for the eastern portion of the embankment would be available from the eastern part of borrow area B, and that an adequate supply of such materials for the western portion of the embankment would be available from the western part of borrow area B, so that no haulage of any such material for a distance greater than 2,000 feet would be required; that after the commencement of the plaintiff's operations under the contract, personnel of the defendant took the position that the plaintiff should not use materials from the western part of borrow area B in the impervious core of the embankment or as select random fill, asserting that the western part of borrow area B was not a suitable source of materials for such purposes; that the plaintiff was accordingly required to haul all of the impervious and select random materials for the entire embankment, including the western portion, from the eastern part of borrow area B; that this made it necessary for the plaintiff to haul impervious and select random materials for distances greater than 2,000 feet in constructing the western portion of the embankment, which increased the plaintiff's costs over what the plaintiff had reasonably contemplated when it entered into the contract; and that the position taken by the defendant's personnel was erroneous, since the western part of borrow area B actually contained an adequate supply of suitable materials that could have been used for the placement of the impervious core and the select random fill in the western portion of the embankment.

It appears from the summary of the plaintiff's evidence set out in the preceding paragraph that the gravamen of the plaintiff's complaint was that personnel of the defendant breached the contract or ordered a change by refusing to permit the plaintiff to utilize, in the construc-

tion of the western portion of the embankment, materials from the western part of borrow area B which the plaintiff was authorized by the provisions of the contract to use for the impervious core and the select random fill.

The preponderance of the evidence in the administrative record establishes, however, that the plaintiff was not instructed by the contracting officer, or by the defendant's resident engineer on the job, or by any other responsible official of the defendant, that the plaintiff should not use materials from the western part of borrow area B for the impervious core of the embankment or for select random fill. What happened was that the plaintiff dug some test holes in the western part of borrow area B, subsurface samples were taken from such holes, and the samples were submitted to a nearby soils laboratory maintained by the defendant. The plaintiff was subsequently informed by laboratory personnel that most of the samples failed to meet the standards prescribed by the contract specifications for impervious and select random materials. The plaintiff proceeded to procure from the eastern part of borrow area B the materials that were needed for the impervious core and the select random fill in the western portion of the embankment, instead of making a further effort to develop the western part of borrow area B as a source of impervious and select random materials for use in the western portion of the embankment. There is no way of determining accurately from the evidence in the administrative record whether, if the development of the western part of borrow area B had been seriously undertaken by the plaintiff, it would or would not have provided an adequate supply of impervious and select random materials for the western portion of the embankment.

The plaintiff did not introduce before the Board any evidence showing that the subsurface data which the de-

fendant furnished to prospective bidders were erroneous. On the contrary, the plaintiff's witnesses conceded that the defendant's subsurface data correctly reflected the actual subsurface conditions at the particular places from which such data were derived.

Furthermore, the plaintiff did not introduce any evidence showing that the defendant's laboratory personnel erred in reporting that most of the subsurface samples taken from test holes dug by the plaintiff in the western part of borrow area B failed to meet the standards prescribed by the contract specifications with respect to impervious and select random materials.

Therefore, it must be concluded that the evidence in the administrative record not only failed to establish that the plaintiff had encountered a "changed condition," as that term was defined in paragraph 4 of the general provisions of the contract, but that the evidence also failed to establish a breach of contract or a change order by the defendant.

Conclusion

It necessarily follows that the plaintiff's motion for summary judgment is denied, that the defendant's cross-motion for summary judgment is allowed, and that the petition is dismissed.

The McQuestion Case

[¶ 6229] D. J. McQUESTION & SONS COMPANY

ENG BCA No. 2714. March 27, 1967. Contract No. DA-34-006-CIVENG-62-2441.

CHANGED CONDITIONS—BORROW MATERIAL—DAM EMBANKMENT.—A contractor was denied an adjustment for increased hauling costs of bor-

row material for use in constructing an embankment because he did not prove that the borrow materials encountered differed materially from what was shown on the contract drawings and the log borings. Further, there was expert government testimony that the materials encountered were what an experienced contractor should have expected from a reasonable analysis of the core boring data and the specifications, and he should have expected that he would have to haul the material from the more distant part of the borrow area.

Harry H. Meisner for the appellant. Dean K. Emery for the government.

Opinion by Mr. Gollomp with Mr. Jellico and Mr. Rhind concurring.

This is an appeal from the contracting officer's decision denying the appellant's claim for additional compensation for the excess cost of overhaul due to encountering an alleged changed condition under a contract for constructing the first stage embankment and spillway excavation at Millwood Dam, Little River, Arkansas.

The contracting officer's denial of the appellant's claim was based solely on his determination that the appellant had failed to give timely notice, as required by General Provision 4 of the contract, which materially prejudiced the Government's right since it was impossible at the time written notice was given for the contracting officer to properly investigate the alleged changed condition. The appellant admits that no written notice was given to the contracting officer until several months after final acceptance by the Government of all of the contract work. However, the appellant contends that the Government had implied or constructive notice of the alleged changed condition during performance of the contract

work. The contracting officer in his decision specifically denied the appellant's allegation of constructive notice to the Government.

In accordance with our order of 2 June 1966 denying the Government's motion to confine the hearing of this appeal to the issue of untimeliness, the hearing was opened to the presentation of evidence on the issues of timeliness and entitlement. We had concluded from our analysis of the pre-trial record that we would have to take considerable evidence on the question of entitlement in order to resolve the timeliness issue.

The contract specifications called for the construction of an earthen first stage embankment from specified grades of soil consisting of impervious material (the core of the embankment), select random material, random material and types A and B filter material. The contract specifications and drawings indicated that borrow area B, which ran parallel to the axis of the embankment on the downstream side, would be a source for the materials (except filter materials) used in the construction of the embankment. The appellant commenced his operations by clearing the land in the area of the spillway and cofferdams at the eastern end of the proposed dam embankment and the material excavated from the spillway was used as fill for the cofferdam. The first portion of borrow area B to be opened up was in the eastern and between approximately Sta. 120+00 and Sta. 130+00 since this part of the borrow area provided the shortest haul distance to the portion of the work required to be completed first under the terms of the contract.[1]

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1. The contract specifications required the completion of all required excavation, construction of the spillway cofferdams, and construction of a sufficient amount of the permanent dam embankment to permit a satisfactory "tie in" with the spillway cofferdams within 360 calendar days after date of receipt of the notice to proceed and the completion of the entire work by 770 days.

As the appellant began the construction of the embankment it took the impervious and select random materials from the most immediate section of the borrow area which was in the vicinity of Sta. 120+00 to Sta. 130+00. There is no disagreement that the contract plans and core boring data indicated that the eastern part of borrow area B contained sufficient quantities of suitable materials. As the appellant moved westward with the construction of the dam embankment, it continued to obtain the impervious and select random type materials from the eastern end of borrow area B.

The appellant asserts that during the construction of the first stage dam embankment it encountered a changed condition arising out of differences in the actual characteristics of the materials in the western part of borrow area B from the characteristics represented by the core boring data shown in the contract drawings and specifications upon which it relied in its bid for the contract. Specifically, the appellant contends that the contract core borings and drawings indicated that sufficient quantities of impervious, select random and random materials could be obtained from various sections of borrow area B along the length of the proposed first stage embankment, except for a particular slough area, and that it anticipated an average haul not exceeding 2,000 feet from the borrow area to the embankment. The appellant asserts that after commencement of operations suitable materials for the placement of the impervious core and select random fill could not be obtained from borrow area B between approximately Sta. 100+00 and the western end of the borrow area at Sta. 53+00. But it was required to haul all of the impervious and select random type materials from the eastern part of borrow area B between approximately Sta. 116+00 and Sta. 140+00 for placement in the western section of the embankment.

In preparing the contract plans and specifications for the construction of the first stage dam embankment, the Corps of Engineers made three parallel rows of core borings along the length of borrow area B at distances of 1,000 feet, 1,500 feet, and 2,000 feet, respectively, from the axis of the proposed embankment (See Appeal Assembly TAB F-1, Drawing C145-60). The materials taken from the borings, which were identified by location number were classified and the thickness, liquid limits and percent fines of the particular materials encountered were indicated on detailed cross-sectional diagrams of each core boring[2] (See Appeal Assembly TAB F-2, Drawing C145-66).

To establish the alleged differences between the characteristics of the materials indicated on the contract drawings and the materials actually encountered by the appellant in the western portion of borrow area B, the appellant presented the testimony of a consulting engineer, Mr. Pate, who had also prepared the appellant's written claims and supporting engineering study. Mr. Pate prepared an analysis of the contract boring data and drawings which purports to show where the impervious, select random, and random materials would be expected to be found in the borrow area App. Exhs. (A and B). This analysis is predicated on the theoretical blending of the various classified soils indicated on the contract drawings. While the procedure of blending materials is used in the construction in-

2. According to the specifications the impervious material was to have at least 70 percent fines (i.e., passing the 200 mesh sieve) and a liquid limit of 32 or greater. The liquid limit requirement is to insure that the impervious core would be sufficiently plastic to resist cracking in the event of differential settlement. The percent fines limitation is to insure that the core would be sufficiently impervious to minimize or control any seepage that would try to percolate through the embankment. The select random had no liquid limit requirement but had to have at least 70 percent fines. The random material was required to be essentially inorganic and capable of being compacted in thin lifts.

dustry, we do not accept Mr. Pate's independent interpretation of the contract core boring data and drawings as determinative of the location or amounts of suitable materials the appellant could have anticipated finding in the western portion of borrow area B.

Mr. Pate was not associated with the appellant at the time of the bidding nor during the construction when the appellant encountered the alleged changed condition. And the appellant presented no evidence showing that in fact it did rely on Mr. Pate's presentation or its own blending analysis in interpreting the contract core boring data and drawings in preparation for its bid, or that it anticipated meeting the liquid limits or percent fines specification standards through the process of blending the materials during the construction of the dam embankment. Mr. Pate was questioned as to the appellant's construction operations and testified as follows (Tr. p. 30):

"Q. Did Mr. McQuestion ever blend materials on the job to your knowledge?

"A. As an actual process of blending?
"Q. Yes.
"A. To my knowledge, no.'

It is noted that Mr. Pate had assumed that the various classified materials would be blended by the uniform scattering and rolling of the materials on the dam embankment and not by a specific mechanical device.

Since we have found that the appellant did not rely on the theoretical blending of the soils from the borrow area in interpreting the contract core boring data and drawings, the question remains whether, on the basis of the information contained in the contract specifications and drawings, actual blending would be practical or that a theoretical blending analysis would be meaningful in eval-

uating the availability of suitable materials in the western portion of borrow area B.

To refute the appellant's reliance on the theoretical blending approach to show what the contract core borings and drawings indicated, the Government presented an experienced soils engineer who testified that the actual blending of soils would not be a reliable or practical procedure in the Millwood Dam because of the particular design of the dam embankment (extremely narrow core), because of the strict specifications, and because the type of materials available in the borrow area would not readily lend themselves to blending and therefore would require very close supervision and inspection to be sure that the materials were thoroughly mixed in the embankment in order to meet the specification requirements.[3]

On the basis of the testimony presented in this appeal we do not consider the results of the blending analysis indicative of what an experienced contractor could have anticipated recovering from the western part of borrow area B based on a study of the contract specifications, core boring data and drawings.

Aside from the blending analysis, the only other testimony presented by the appellant concerning what the contract boring data and drawings indicated were general statements by the appellant's project engineer, who also estimated the bid for the contract, that from the reading of the core borings and drawings, and what was told to

3. The Government expert witness acknowledged that it would be possible to perform the required blending (i.e. the blending needed to meet the contract specifications) under laboratory conditions but that blending under actual conditions would be impractical with the materials at Millwood Dam. Mr. Pate, in support of his theoretical blending, did present the results of a laboratory test but the materials used in the test were not taken from borrow area B nor was the procedure followed in the laboratory test fully discussed by the witness.

him he expected to find sufficient amounts of suitable materials in the western portion of the borrow area. However, it is noted that the Government expert soils engineer presented three-dimensional soil profiles of borrow area B (Govt. Exhs. 4 and 5) which the appellant contends supplement Mr. Pate's exhibit (App. Exh. A) and fairly represent what the contractor should have expected to find in the borrow area.

Both the Government's three-dimensional soil profiles (Govt. Exh. 5) and the appellant's blending analysis (App. Exh. A) show essentially uniform impervious material at the outer boundary of the borrow area around 2,000 feet from the axis of the embankment, but Pate's blending analysis portrays the western portion of borrow area B as having substantial sections of uniformly suitable materials. The main thrust of the testimony and exhibits presented by the Government's expert soils engineer is that while it was possible for the appellant to have recovered certain uniform amounts of select random and impervious materials in the western portion of the borrow area (but the exact quantity being uncertain until the area was opened up), the soil from approximately Sta. 110+00 to the west end of the borrow area at Sta. 53+00 is highly erratic with no continuity of select random and impervious type materials (Tr. pp. 223-226). We find that the soil profit provide a more reasonable representation than the blending analysis of the soil condition that the appellant should have anticipated encountering in the western portion of borrow area B.

The appellant presented several of its employees who testified in substance that the appellant had dug numerous holes in the borrow area in search of suitable materials, that samples were taken from the borrow area by Government personnel and the appellant, that the samples taken

from the borrow area were tested by the Government personnel and by the appellant, and that the materials tested were rejected by the Government as unsuitable for the project. There is sharp controversy in the record as to what samples were actually taken from the western end of borrow area B and what laboratory tests were actually run by the Government testing personnel. The problem is compounded by the fact that the appellant was unable to locate or produce at the hearing any written reports of tests run by the Government laboratory personnel on materials from the borrow area for the supposed purpose of determining the suitability of the materials. The appellant did present undated field survey notes, of an unavailable former employee of the appellant, which indicate the location of certain holes dug by one of the appellant's employees in the borrow area. These field survey notes only tend to corroborate the appellant's contention that holes were dug in search for suitable materials, but do not contain any information as to the characteristics of the soil presumably dug from the indicated holes, the elevation to which the holes were dug, or whether any laboratory tests were actually run on the materials from the particular holes. The Government's chief inspector and the laboratory technician, the Government employees who had direct knowledge as to what samples were taken and what tests run by the Government on materials from the borrow area, acknowledged that they had taken many samples from the borrow area on a routine basis for running Proctor tests to determine the proper moisture content needed to obtain the best compaction of the materials on the dam embankment, and also for running a simplified soils test (wash loss) as a check of the types of material in the borrow area. But both witnesses testified that none of the tests that the Government ran on the soils in the borrow area indicated results that would suggest that the

tested materials differed from the materials represented on the contract drawings (Tr. pp. 196, 206). The Government laboratory technician did testify that he and an employee of the appellant tested about 20 samples brought by the appellant to the laboratory which he surmised came from the holes dug by the appellant in the borrow area. However, he had no knowledge as to the station location, elevation or the sampling procedure followed by the appellant and could not verify such information (Tr. p. 212). He did recall that about 4 or 5 passed the percent fines requirement but that the rest were either marginal or failed to meet the contract specification. It is noted that the appellant's employee assigned to the Government laboratory testified that some of the samples brought by the appellant to the laboratory met the contract specification standards and that some failed (Tr. p. 136).

The testimony of the appellant's and Government's witnesses does establish the fact that neither the resident engineer nor the assistant resident engineer communicated to the appellant that particular tested materials were unsuitable for the project or directed the appellant to take select random and impervious materials from only the eastern end of borrow area B. Also the Government's resident engineer, assistant resident engineer, chief inspector and laboratory technician each testified that none of the appellant's employees ever stated that the appellant had encountered a "changed condition" during the course of the construction work.

DECISION

General Provision 4, the CHANGED CONDITIONS clause reads in pertinent part as follows:

"The contractor shall promptly and before such conditions are disturbed, notify the Contracting Officer in

writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, ..."

In order to establish a changed condition within the meaning of the above-quoted part of General Provision 4, the appellant has the burden of showing by the preponderance of evidence that there was a contractual misrepresentation as to the characteristics or suitability of the materials in the western portion of borrow area B for use as impervious or select random fills.

The record is clear that the appellant obtained the necessary amounts of impervious and select random fills from the eastern end of the borrow area and did not go outside borrow area B for such materials.

We conclude from the evidence presented by the appellant that it has failed in its burden of establishing that the materials which it encountered differed materially from what is shown on the contract drawings and log borings or that the soil conditions encountered were not what an experienced contractor should have anticipated from a reasonable analysis of the core boring data and specifications. We do not question that the appellant dug many holes in the borrow areas, that an employee of the appellant and a Government laboratory technician ran tests of samples brought in by the appellant, and that certain tested samples either failed to meet the specifications or indicated marginal material.

The difficulty alleged by the appellant in locating any amounts or even limited amounts of suitable materials in the western portion of borrow area B is not inconsistent with our finding based on the evidence presented that the soil condition in the western portion of borrow area B was highly erratic with no continuity of impervious and select

random type materials (except for an area of some fairly uniform impervious type materials at the downstream boundary of the borrow area).

Additionally the Government argues that an authorized representative of the Government did not have timely notice of the alleged changed condition in borrow area B and that lack of such notice was prejudicial. Borrow area B was sufficiently disturbed at the time written notice was given to make it difficult for the Government to properly determine the existence of the alleged changed condition.[4] The appellant asserts that while written notice of the alleged changed condition was not given until after final acceptance of the contract work, the Government did have implied or constructive notice. Since we have found that there was no changed condition within the meaning of General Provision 4, we need not pass on the issue of timely notice.

The appeal is denied.

Excerpts from Testimony of Charles C. Pate from Transcript of Proceedings Before the Corps of Engineers Board Contract Appeals. (Pages 25-29)

Q. Now Mr. Pate, let's study some of these borings that are in the contract - - - what does this exhibit show?

A. The coloring on this Exhibit A indicates the conditions that would be expected from the data shown on the Government's drawing - - - of these borings, and the material, gradation and liquid limit as shown on those.

Q. You mean your exhibit demonstrates what the actual contract drawing represents to the bidder?

A. It does. That is what it represents to me.

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4. The Government presented evidence that the second stage contractor had used borrow area B material for fill before the appellant gave written notice to the Government.

Q. (Page 27 of transcript) I now ask you, in that general area on appellant's Exhibit A you indicate that material to be select random.

A. That is correct.

Q. Now, what do the specifications require for select random?

A. It requires that we shall have a minimum of 70 per cent passing at 200 mesh sieve.

Q. Does the first three feet of boring B-1 A meet that requirement?

A. No.

Q. (Page 28 of transcript) Now the next 1 and 1.2 feet are down to 4.2 feet on that boring. You have what condition?

A. 70.

Q. That part would fail to meet the requirement as far as liquid limit is concerned for impervious fill, is that not correct?

A. That is correct.

A. (Page 45 of transcript) I will testify right now what I was told by John Barrett, that the material was tested in their lab at Ashdown, that it was found spotty, and in some instances met or did not meet the requirements for the different types of specific material, but that it was not considered in economical quantities. He made that statement to me in Ashdown, and he made that statement to me at the hearing in Tulsa.

Q. Well, that is exactly what the contract borings show too, isn't it, that it is spotty?

A. No sir, it does not.

Q. (Page 47 of transcript) by Mr. Meisner: Who is Mr. Barrett?

A. Mr. Barrett at that time was assistant resident engineer on the Millwood Dam.

Q. Government?

A. For the Corps of Engineers.

Q. (Page 59 of transcript) Do you believe that the contract drawings indicated the availability of suitable materials in sufficient quantities to construct the project?

A. The contract documents? Yes I do.

Q. (Page 60 of transcript) Did the rejection of these materials due to the tests run by the Government from samples taken by the contractor in effect indicate a changed condition?

A. They did, they are different. The verbal reports made on the materials tested are different from those indicated on the contract drawings.

Q. (Page 246 of transcript by Mr. Jellico of the Board) Let me ask, what is your position now, is there or isn't there good material in that area?

A. From the records that we do have available I do not believe that there is any quantity of material in this area that would be suitable from an economical excavating area.

Q. (By Mr. Jellico) Do you think we can find that as a fact based on the record that has been made?

A. I think you can, yes.

Excerpts from Testimony of Mr. McQuestion

Q. (Page 87 of transcript) How did you fare financially on this contract?

A. I lost about $670,000.

Q. (Page 88 of transcript) What was the chief reason for losing that money?

A. Well there were two main reasons. One was because of the over-haul. And the other, our biggest loss on any particular item was the discing and rolling of the material, placing the material.

Q. Um, this over-haul that you are speaking of can you tell the Board in your own words just how that over-haul came about?

A. Well, we planned on getting impervious and select random, mostly select random, from adjacent to the Dam, or parallel to the dam at about a 2000 foot average haul.

Q. Then what happened?

A. Well, this material at the west end of the dam didn't prove safe. So we went to the extreme east end to get it.

Q. (Page 89 of transcript) Why did you have to go to another spot?

A. Because this material failed to pass the specifications.

Q. Can you specify the location of the material which was unsatisfactory to the government?

A. This was all unsatisfactory.

- - -

Q. What do you mean precisely?

A. - - - There were tests taken and none of them passed. And the tests taken evidently didn't correspond with the borings on the plan.

Q. (P..90 of transcript) Where were the tests taken?

A. They were taken almost every place - - - I would say 60 or 70 holes to this area and from here back in here, 1500 foot further than this.

Q. These samples were taken by your men in conjunction with the government personnel.

A. (P. 91 of transcript) Yes they helped.

Q. And where were they taken to?

A. Taken to the laboratory, and some were taken in Ashdown.

Q. Whose laboratory?

A. The Government laboratory.

Q. And there it was annqunced that the tests were not satisfactory?

A. The reports came back to us on the job that they didn't pass.

Q. And for that reason you were obliged to go elsewhere?

A. Yes.

Q. And in going elsewhere you incurred this additional expense?

A. Yes.

Q. And how much of a claim does that amount to?

A. He made it as low as possible to get a quick settlement out of it, of $187,000.

Q. (P. 100 of transcript) Did any representative of the government ever direct you to obtain material from the east end of the site?

A. We didn't have any place else to go, this wouldn't pass, so we went to the nearest place and that was the East end.

Q. (P. 101 of transcript) Did any government employee ever tell you that the material in that area was not satisfactory for meeting the contract?

A. Stacy Guthrie was the chief inspector at that time.

Q. For the government?

A. Yes.

Q. And you are saying he told you that this material was unsatisfactory?

A. That is right.

Q. All of it?

A. He told us that he couldn't check it unless it was in place.

Q. Are we talking about all the material from station—what?

A. 105.

Excerpts from Testimony of Jessie White

Q. (P. 103 of transcript). Tell the Board in your own language just what you know about that.

A. - - - (P. 105 of transcript) Mr. David Rice of the Corps of Engineers came down with his assistant - - - and took samples from this particular point - - - he took the samples to the Corps of Engineer headquarters, I didn't go with him, he had taken the samples with him - - - and when he came back by said that the material was not suitable for the particular use we needed it for at that time.

Q. (P. 107 of transcript) And you say that when David Rice came alone he took the samples with him and when he came back he told you the materials were no good.

A. No he didn't tell me directly, - - - he told the superintendent of construction in my presence.

Q. And Mr. David Rice occupied what position with the government.

A. He was I believe in charge of the laboratory, testing materials.

Excerpts from Testimony of Burl Brown

Q. (Pp. 124-5 of transcript) - - - How many holes did you dig in one day.

A. Approximately 15 to 20.

Q. - - - During the six days you dug - - - about 90 holes.

A. I would say more like 90 holes.

Q. Who picked up the materials.

A. - - - Usually they were Corps men during the day that would come by and picked them up.

Excerpts from Testimony of Claude Barr

Q. (P. 135 of transcript) Do you recall Mr. Bud Hendershot.

A. Yes.

Q. (P. 136 of transcript) Did he ever come on to the testing laboratories?

A. I would see him most of the time down on the highway road; he would come up and talk to David, wanting to take some samples. He did come up to the office a few times, yes.

Q. Did he give any reason why he came up to find out about the tests.

A. Well, they were having trouble with the tests in trying to pass. There would be more failures than good tests - - - so they kept taking more and more tests.

Q. Did he say anything to you about the reason - - -.

A. Well they were trying to find good dirt where they could clear the trees and haul the material.

Q. (P. 141 of transcript) So the material that you noticed or that appeared to you was failing was coming out of - - - the east side - - - or the west side?

A. That would be the west side of the slough.

Q. (P. 142 of transcript) Did they ever test materials or did you ever assist in running tests on materials that came from the eastern end of borrow area B?

A. Yes, I helped run them.

Q. Did they ever get failures on those materials?

A. Yes, they got a few, but most of it was good material, they didn't have too much trouble.

Excerpts from Testimony of Phillip Goodman

Q. (P. 145 of transcript) What is your position?

A. My present position is Resident Engineer in complete charge of construction of these two Dams.

Q. You served as Resident Engineer over the Mc-Question Contract at Millwood?

A. Yes. I was in charge of that job from the beginning to the end.

Q. (Pp. 160-161 of transcript) Didn't you examine the job? Didn't you go and take a look - - -

A. Actually, the greater part of my work was in the office. Mr. Barrett, my assistant took care of the field.

Q. So you didn't know very much about what was going on; the physical aspect?

A. Yes, I knew quite a bit about what was going on.

Q. How did you know, if you were in the office, what was going on?

A. I made a tour of the job every day I was there.

Q. And you didn't see the back hoe in the summer of 1962?

A. No, sir.

Q. You heard the testimony of witnesses that they had back hoes there taking samples?

A. Yes, sir.

Q. And one witness stated that there were 90 holes taken by those back hoes. And still you didn't see it?

A. I didn't see it, no.

Excerpts from Testimony of John M. Barrett

Q. (P. 175 of transcript) Mr. Barrett, you have heard some testimony to the effect that you were aware of certain alleged tests having been taken and that there were failures indicated by the results of these tests. I now ask you, were you aware at any time under this job of the results of any such alleged tests?

A. No, I was not.

Q. Did you ever have a conversation with the contractor or his representatives to the effect that he was experiencing any difficulties in obtaining materials from the western borrow area B?

A. Not until about October, 1963.

Q. (P. 176 of transcript) Did you ever observe a back hoe being used by the contractor on this job to dig any job from which samples might be taken?

A. No, sir, I did not.

Q. (Pp. 186-187 of transcript) - - - You said you heard there was so much failure of the materials that you were willing to assume that the tests were made?

A. I am trying to distinguish between my having any exact knowledge from observation, having been out there when tests were made, or seeing them made, or being told at the time they were being made, and information coming to me later saying that certain tests were made. I am speaking about at the time that they were made.

Q. - - - You were the Assistant Resident Engineer to Mr. Goodman - - - I assume you visited the property frequently?

A. I visited the site frequently and I feel reasonably sure that I knew what was going on.

Q. You heard Mr. Burl Brown testify that in the summer, more specifically in July of 1962, he spent six days with a back hoe and he made 90 holes - - - and you didn't see the back hoe, and you didn't know anything about these 90 holes?

A. No, sir.

Excerpts from Testimony of Troy Gladden

Q. (P. 193 of transcript) Did you serve as Chief Inspector under the McQuestion contract at Millwood?

A. I was Chief Inspector at the start - - -

Q. (P. 194 of transcript) Do you have any knowledge while Chief Inspector - - - of the digging of hole?

A. - - - the beginning of digging holes was in the spring of 1963, the late spring on early summer, in May or June of 1963.

Q. Was a back hoe used to dig these holes?

A. Not at first, but, yes, a back hoe was used.

Q. (P. 195 of transcript) Did you ever accompany Mr. David Rice, whom we have learned was working in the Government laboratory - - - to take samples for testing in borrow area B?

A. Yes, sir.

Excerpts from Testimony of David H. Rice

Q. (P. 202 of transcript) Who is your present employer?

A. The U. S. Corps of Engineers - - -

Q. (P. 206 of transcript) Were you familiar with the original contract logs that are included in this - - - McQuestion contract?

A. Yes, sir, I am. I studied these before the contract was open, the bids were open and I could readily see by these at this time that we were going to have problems in the west end of borrow area B.

Q. Most contractors used in hauling dirt would be scrapers and this would be hard to manipulate to come up with the select material and the impervious that we would want to get out of this area.

A. (Pp. 207-210 of transcript) - - - this led me to believe that readily available impervious material would be hard to find up on the western end of the borrow.

Q. And they were surprised when they found that the material was not as they had expected it.

A. Right, I would say that they were surprised.

Q. (P. 212 of transcript) - - - how many tests - - - did you perform on materials that were taken from any of these holes that may have been dug by a back hoe?

A. I would say it wasn't over 20.

Q. - - - Do you have any knowledge as to the results of these tests - - -

A. - - - I would say 4 or 5 passed as far as percent fines passing the 70; I would say they were from 70 up to 74. But the others were either marginal or failed.

Excerpts from Testimony of Vernon Hendershot the Project Engineer

Q. (P. 65 of transcript) Do you know of certain tests that were made in government laboratories?

A. I know that we took several tests. There were many tests made, actually, we put on quite a program of digging holes and submitting the material to the government.

Q. (P. 66 of transcript) - - - What was the result of the tests?

A. I never heard of any of it ever passing, ever being suitable, at no time.

Q. The government rejected the material taken from these test holes?

A. - - - They told us that - - - we could not use it in the dam, or if we used it, we used it at our own risk.

Q. (P. 67 of transcript) Did you ever tell anybody you had a problem?

A. (P. 68 of transcript) Yes, I did - - - I did discuss it with Troy Gladden - - - He was chief inspector I believe, he was over the inspectors - - - on this contract. - - - I am sure I discussed it with other people.

Q. (P. 76 of transcript) - - - You knew of no material that was suitable as you said to the government in the west end of borrow area B?

A. I never knew of any material that they would accept as impervious material or select random material in the west end of borrow Area B.

Q. (P. 77 of transcript) But you can't recall specific instances when the material failed, you just know there were some.

A. At all times that I know it failed, every time.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-276

D. J. McQUESTION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves a claim for additional compensation pursuant to the "changed conditions" clause (Pet. A3-A4) of a government contract. Petitioner had contracted to construct the earthen first-stage embankment of the Millwood Dam at Little River Arkansas. The contract provided that fill for the embankment was to be taken from a designated borrow area and was to be of a certain quality. Petitioner alleged a changed condition in that the material actually encountered in the source area differed ma-

terially from that indicated on the contract drawings, and that, therefore, all of the fill material had to be taken from a more distant location with a consequent increase in cost.

The contracting officer denied the claim for these additional costs, on the ground that petitioner had failed to give timely notice of the alleged changed conditions as required by the contract. After hearing, the Board of Contract Appeals found that petitioner had failed to establish its claim on the merits and thus deemed it unnecessary to pass on the issue of notice (Pet. A8-A19). The Court of Claims affirmed (Pet. A1-A8), concluding that the record amply supported the conclusion of the Board (Pet. A8). As that opinion demonstrates, there is no occasion for further review in this essentially factual case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 438306 17.